No. 22,464

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELECTROMEC DESIGN AND DEVELOPMENT COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

LAWRENCE M. JOSEPH,
LEON M. KESTENBAUM,
Attorneys,

National Labor Relations Board

THE CASILLAS PRESS, INC. 1717 K Street, N. W. Washington, D. C. 20006

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AUTHORITIES CITED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employees Robert Saxer, Davy Mooney, Wilfred Gilbert, and Charles Pickelman because of their participation in a protected work stoppage.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of Electromec Design and Development Company, Inc., pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), to review an order of the National Labor Relations Board issued on December 8, 1967 (R. 145-154, 19-33).[1] The Board's decision and order are reported at 168 NLRB No. 107. The Board has cross-petitioned for enforcement of its order. This Court has jurisdiction over the proceeding, the unfair labor practices having taken place in Santa Clara, California, where petitioner (the "Company") is engaged in the servicing of electrical equipment. No issue as to the Board's jurisdiction is presented.

I. The Board's Findings of Fact

The Board found that the Company violated Section 8(a)(1) of the Act by discharging Robert Saxer, Davy Mooney, Wilfred Gilbert, and Charles Pickelman because of their participation in a protected work stoppage. The facts on which the Board's findings rest are summarized below.

In 1964, the Company added a metal shop to its operations in which, using tools and equipment provided by IBM, it constructed test equipment

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[1] References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order, and other papers reproduced as Volume 1, pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the rules of this Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

solely for that firm. The metal shop was divided by a partition into a sheet metal shop and a machine shop (R. 20; Tr. 85-87, 139). On various dates in 1965, the Company hired, at the behest of IBM, a number of tool and die makers to work in the machine shop. Among those hired were employees Saxer, Mooney, Gilbert, and Pickelman (R. 20; Tr. 87, 9-10, 36, 50, 65).

In February 1966,[2] a union representation election was held at the Company, and the employees voted to reject the Union[3] (Tr. 21; R. 72, 88-89, 147). Thereafter, during March, Pickelman, Mooney, Gilbert, and two other tool and die makers approached Company President Joseph Padgett and requested that the employees be given a holiday on Good Friday. Padgett granted the request (R. 21; Tr. 37-38, 72, 91).

In mid-July, tool and die maker Saxer, who earned $4.20 an hour, asked Carl Porschien, the manager of the metal shop, for a raise. Porschien agreed to check with his superiors, and returned later to tell Saxer that he would be given a five cent increase. A short time afterward, Saxer inquired if "there [was] any chance of getting a little more than this?" Porschien replied that there was no chance at that time, but that he would see what came up in the next four to six weeks. At the end of that period, Saxer again asked Porschien for an increase, claiming that the rate he was receiving was insufficient for a tool and die maker. Porschien disputed this and refused to grant Saxer an increase. Saxer then encouraged other employees to follow his example and ask the Company for raises (R. 21; Tr. 13-15).

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[2] All dates are in 1966.

[3] The record does not indicate the scope of the unit in which the election was held, but it is clear that such unit embraced at least the tool and die makers (R. 21; Tr. 89).

Shortly after Labor Day, Saxer again approached Porschien and inquired if an employee (Ford), who had not worked the day after Labor Day because of illness, would be paid for the holiday. Porschien responded by asking Saxer, "What are you, some sort of a committeeman or something for the group?" Saxer answered that he was only "trying to find out what happened," that "what happens to one man in the shop can happen to another man," and that he was therefore interested in knowing what the Company policy was (R. 21; Tr. 15-16).

In mid-September, the machine shop employees met and discussed working conditions at the Company in an effort to "tr[y] to figure out what points [they] would like to submit to management as things [they] wanted for benefits." They agreed to present the following demands to the Company: (1) a two week paid vacation after one year of employment; (2) an improved hospitalization plan; (3) sick leave; (4) a modification of the rule requiring employees to work the day before and the day after a holiday to be eligible for holiday pay; and (5) overtime pay for all Saturday work (R. 21-22; Tr. 16, 18).

Saxer then went to Porschien and submitted the employees' five demands to him. Porschien read the demands, but told Saxer, "I can't do anything about it." Saxer requested that Porschien "set something up with management or somebody [the employees could] talk to." Although Porschien acceded to this suggestion, there was some delay in arranging the meeting, and, therefore, "every other day or so" different employees in the machine shop would approach Porschien and question him as to when the meeting would be held (R. 22; Tr. 16-17, 52). A meeting for the tool and die makers was finally scheduled to be held on September 21, at 4:15 p.m., after working hours. A second meeting was arranged the next day for the remaining employees in the machine shop (R. 22; Tr. 17, 52, 148-149).

At the September 21 meeting, Saxer, Mooney, Pickelman, Gilbert and three other tool and die makers met with President Padgett, Vice-President Fred Vasta, and the leadman in the machine shop, Forrest Starr (R. 22; Tr. 18). When the meeting opened, Saxer, in response to a question by Padgett, acknowledged that he would be the spokesman for the employees. Saxer then presented the five points which the employees had agreed upon (R. 22; Tr. 93, 18). Padgett listened to the employees' proposals, promised an improved hospitalization plan, but otherwise rejected their demands. Padgett refused to change the Company's vacation policy of two weeks vacation after three years (as opposed to the employees' demand for two weeks after one year); explained that the Company was still too small to be able to afford sick leave; and contended that there could be no overtime for Saturday work because IBM's work-week began that day, and it was necessary for the Company to conform its work-week to that of IBM. Regarding the demand for modification of the rule requiring an employee to work both the day before and the day after a holiday to be entitled to holiday pay, Padgett asserted that this rule was necessary to prevent employees from leaving at noon on the day before a holiday or returning at noon the day after. Padgett agreed, however, that an exception might be made if the employee's absence was caused by illness and he proved this by bringing in a doctor's certificate (R. 22; Tr. 93-95, 26, 29, 47-48, 58, 73-74).

On Saturday, October 8, at 8 a.m., Saxer went to Porschien and told him that he "would like to talk to [him] about a raise." Porschien replied: "I just talked to you about a raise two or three weeks ago. Your rate is sufficient for a toolmaker, and we are going to keep this rate the way it is for a while." Saxer then told Porschien that if this was the situation, he was tendering his resignation as of October 14 (the end of

the work-week). Porschien answered, "All right, fine, Bob" (R. 23; Tr. 19-20, 25-26).

About 9 a.m., Porschien granted Saxer permission to leave early (R. 23; Tr. 159-155). Thereafter, Mooney, Gilbert, and Pickelman approached leadman Starr (Porschien was out of the metal shop at the time) and asked to be allowed to take the afternoon off. Although only Gilbert had an excuse for leaving before the end of the day – to see that his wife was following her doctor's prescribed treatment for her high blood pressure – Starr gave all three employees permission to leave early (R. 23-24; Tr. 54, 67, 40, 189-186). The Company's policy was that Saturday work was more or less optional, and that an employee could take the day off unless the Company was "in a position where a job had to be gotten out" (R. 24; Tr. 62-63).

Later, after going back to work, Saxer informed the other employees of his decision to resign. The employees then decided that this would be a good time to "wake up" management and that they would all leave early (R. 23; Tr. 20-21, 67, 40, 53-54).

At 11:22 a.m., all the employees in the machine shop, about ten men, plus Will Mooney of the sheet metal shop (a brother of toolmaker Davy Mooney) lined up at the time clock intending to punch out two minutes later at 11:24 a.m. Starr, noticing the employees "all ganged up at the clock", asked the group "What's going on here?" One or more of the employees replied that they were going home. Starr then left, found Porschien in the engineering department, and returned with him to the metal shop. Porschien asked the employees what was going on, and was advised by an employee that the men were going home. Porschien then told Saxer that he was under the impression that Saxer had wanted to leave at noon, and questioned Saxer as to why he was leaving at 11:24

a.m. rather than at lunchtime. At that point Mooney spoke up and explained that it would be easier to compute the pay for five hours work. At 11:24 a.m. the employees punched out and left (R. 24; Tr. 187, 156, 61).

After the walkout, Porschien informed an IBM manager, Cliff Walsh, as to what had happened, and Walsh undertook to notify officials of Electromec (R. 29; Tr. 157). Walsh reached Vice President Vasta later that evening, and the following morning, Sunday, Vasta informed President Padgett as to what had taken place. Padgett told Vasta to go to the plant with the manager of the personnel department, Kochenberg, and the assistant manager, Bunker, to telephone each employee who had walked off the job, and to ascertain why these employees had left. At the office Vasta and the two personnel men divided the list of names of those employees who had participated in the walkout and proceeded to call them (R. 29-25; Tr. 206-208, 98).

Vasta spoke to Saxer, Gilbert, and a third employee named Bates. When Vasta asked Saxer why he had left on Saturday, Saxer replied that he "felt like taking the afternoon off." Although Vasta pointed out that all the employees had walked off the job together, Saxer did not elaborate upon his excuse for leaving and said only that he "didn't know about the other men [, that t]hey [would] have to speak for themselves." Saxer declined to go to the Company office and speak to Vasta about the matter (R. 25; Tr. 208-209, 23).

Gilbert informed Vasta during their telephone conversation that he had left because "he was not happy with a 15-cent differential between his rate and the top rate in the shop."[4] Vasta asked Gilbert to "come down

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[4] Tool and die maker Pickelman received the top rate, $4.40 per hour (R. 20; Tr. 36).

to the office and talk to [him] about it personally," but Gilbert refused, saying "No, I don't want to do that. I will see you tomorrow as a group" (R. 25; Tr. 209, 67-68).

Bates, the last employee reached by Vasta by telephone, told Vasta he had walked out on Saturday because of the "mess in the shop." Bates also advised Vasta that "he was unhappy with the whole situation and he didn't know exactly what he was going to do." Vasta then requested that Bates come down to the office, and Bates did. At the office, Bates remarked that ever since his failure to attend the September 21, meeting between the tool and die makers and management, "the rest of the boys in the shop [had given him] nothing but a hard time," and refused to talk to him or have lunch with him. Bates explained that the reason he had left early was that he not only had to work with his fellow employees but "to live with them" (R. 25; Tr. 210).

Assistant Personnel Manager Bunker telephoned and spoke with two other employees who had participated in the walkout. Employee Jim McKenna reported that he had taken the rest of the day off because he had had an appointment, and Will Mooney explained that he had left because "he was tired of working overtime." Bunker relayed what he had learned to Vasta (R. 25; Tr. 135, 137).

That same Sunday evening, after the phone calls were completed, Vasta met with President Padgett. Vasta suggested that all of the employees who participated in the walkout should be fired, but Padgett reminded him that there was "work to get out" and that it would be necessary to be more selective (R. 25; Tr. 212). When he arrived at the plant the next morning, Vasta told Porschien to remove the time cards of toolmakers Saxer, Davy Mooney, Gilbert, and Pickelman, and also the card of sheet metal worker Will Mooney. However, when Porschien

mentioned that he felt that Will Mooney "was just caught up into a situation whereby he . . . had to live with everybody" but that he was "primarily happy" with the Company, Vasta agreed not to pull Will Mooney's card (R. 25-26; Tr. 211-213). Porschien then proceeded to remove the cards of the four remaining employees, and a few minutes later told Vasta all that he knew about the walkout (R. 26; Tr. 174-176).

Davy Mooney, who had been injured in a boating accident during the weekend, called leadman Starr to say that he would not be in, and Starr advised him to call back later because the tool and die men were having a meeting with management (R. 26; Tr. 54). The other three employees whose cards had been pulled – Saxer, Gilbert, and Pickelman – arrived for work shortly after 6 a.m. and were told by Porschien to wait. At 6:24 a.m., starting time, Starr told the employees not to prepare for work. About an hour later, Porschien ushered the three men upstairs to the conference room, where they joined Padgett, Vasta, and Bunker. Padgett looked through a file of papers that were in front of him,[5] and then called upon Porschien to speak (R. 26; Tr. 21-22, 41-42, 43-44, 68, 101-102). Porschien informed the employees that their services as tool and die makers were no longer needed. When Saxer asked if this meant that they were discharged, Padgett answered "in a sense" and then, in response to a second question, assured the three employees that they would not be "blackballed" (R. 27; Tr. 79, 102, 22).

After Davy Mooney had learned from Starr that a meeting of the tool and die makers was being held, he drove to the plant. Upon arriving at

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[5] The Trial Examiner found that "it is possible that the papers which Padgett was examining were management accounts of what had been said and done by the four men and that in retrospect, he remembered these and confused them with such statements of the men as were made at the meeting."

the parking lot Mooney encountered Pickelman, who advised him that "there wasn't even any use to getting out, that [they] had all been fired." Mooney then approached Porschien and asked him if it were true that he was fired. Porschien said that it was, and requested that Mooney follow him to the personnel office. At the office, Mooney questioned Porschien as to "exactly why he had been fired." Porschien responded: "Well, Dave, we can't have everyone going home at noon every time somebody quits." Porschien also told Mooney that the services of the tool and die makers were no longer needed (R. 27; Tr. 54-55).

II. The Board's Conclusions and Order

On the basis of the foregoing evidence, the Board found, in agreement with the Trial Examiner, that the Company discharged Saxer, Mooney, Gilbert, and Pickelman because they had engaged in a concerted work stoppage. The Board further found – reversing the Trial Examiner on this point – that this concerted activity, because it concerned terms and conditions of employment, was protected under Section 7 of the Act. The Board therefore concluded that the discharges violated Section 8(a)(1) of the Act (R. 145-151).

The Board's order requires the Company to cease and desist from the unfair labor practices found. Affirmatively, the Company is required to offer reinstatement to Saxer, Mooney, Gilbert, and Pickelman, to make them whole for any loss of earnings suffered as a result of the unfair labor practices, and to post an appropriate notice (R. 152-154).

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding that the Company Violated Section 8(a)(1) of the Act by Discharging Saxer, Mooney, Gilbert and Pickelman because of their Participation in a Protected Walkout

Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purposes of collective bargaining or other mutual aid or protection." As this Court noted in *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1, 3, Section 7 "specifically distinguishes between the purposes of collective bargaining and the purpose of other mutual aid or protection," and protects "concerted activities, even though not collective bargaining, which have to do with terms and conditions of employment."

The Company concedes that the walkout of October 8, was concerted activity (Br. p. 30). There is also no doubt that the four employees discharged – Saxer, Mooney, Gilbert, and Pickelman – were fired because of their participation in this concerted activity. The credited testimony of the Company's witnesses shows that on the Sunday evening after the walkout, after Vasta had spoken with several employees who had taken part in the walkout, he then conferred with President Padgett and suggested that all of the employees who had walked off the job should be fired. Padgett, as the Trial Examiner noted, "was inclined to be more selective," and pointed out to Vasta that the shop could not function if all of the employees were terminated. Vasta proceeded to select those employees to be discharged, and the next morning Saxer, Mooney, Pickelman, and Gilbert were dismissed.

The Company argues that the employees, who were highly paid tool and die makers, were discharged because they were overqualified for the work they were required to do and could be replaced by less skilled employees. The Company concedes, however, that absent the walkout it was content to wait and replace the toolmakers through normal attrition (Br. p. 24); indeed, three toolmakers who worked on the night shift and who did not participate in the walkout were not discharged (Tr. 110-111). As Vice President Vasta testified, the four toolmakers "were specifically fired because they had walked off the job without giving notice." And President Padgett, when asked what led to the firing of the toolmakers replied, "walking off the job" (Tr. 110). It is thus evident that it was the walkout, rather than the fact that the toolmakers were "overqualified," which provided the reason for the discharges.[6]

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[6] Thus, the fact that Saxer was to voluntarily terminate his employment with the Company shortly after he was discharged on October 10, has no bearing on the reason for his discharge. Prior to the walkout, the Company was obviously content to allow him to resign at the end of the week. It was only after Saxer had participated in the walkout that the Company decided to discharge him immediately.

The Company's further argument (Br. pp. 22-23), that the dischargees did not engage in "concerted activity" because they received permission to leave early, is completely without merit. In the first place employer permission is irrelevant in determining whether or not the employees engaged in concerted activities. The fact that some employees may have participated in concerted activity with the blessing of their employer does not, of course, render such activity any less concerted. To reason otherwise, would lead to the absurd result that an employer could deprive his employees of the right to engage in protected activities for their mutual aid and protection simply by sanctioning such activities.

In any event, the Company's contention is factually incorrect. The four toolmakers did not seek, and were not given, permission to engage in a concerted work stoppage. As shown in the text (*supra*, p. 6), Saturday work was more or less optional and the Company did not care if some employees did not work that day as long as production at the shop did not suffer. The Company, therefore, did not object when the four toolmakers asked – as individuals – for permission to leave early. On the other hand, the Company did object strongly to the fact that these employees joined the entire machine shop in walking off as a group; and, while the four toolmakers may have had permission to leave early, they did not have permission to interrupt production by participating in a unified protest against management.

We come then to the question of whether the concerted activity for which the toolmakers were discharged was for the purpose of "mutual aid or protection," and therefore protected under Section 7 of the Act as activity concerning terms and conditions of employment. We submit that substantial evidence supports the Board's finding that the walkout was "a manifestation of the general dissatisfaction among machine shop personnel as to the failure of management to accede to their demands" (R. 149).

As the Board noted, the walkout was supported by all the machine shop personnel, a group which, during the three months preceding the walkout had demanded, both individually and concertedly, improvements in their terms and conditions of employment. Thus, these employees first insisted that they be given Good Friday as a paid holiday, and the Company acceded to this demand. Subsequently, in mid-July, Saxer asked manager Porschien for a raise, and was given a five cent increase. Further attempts by Saxer to secure an additional increase were unavailing and he then advised other employees to request increases from management. At least one employee, Davy Mooney, did ask for a raise (Tr. 51). On September 21, the tool and die makers met with President Padgett and other management representatives (the rest of the employees in the machine shop attended a similar meeting on the following day), and presented their demands for increased vacations, improved hospitalization, sick leave, modification of the rule requiring an employee to work the days before and after a holiday to be eligible for holiday pay, and overtime for all Saturday work. Saxer served as the spokesman for the employees. After listening to these proposals, Padgett promised some improvement in hospitalization benefits, but otherwise merely explained to the employees why the Company was unable to grant their requests.

These demands were still pending and unsatisfied when less than three weeks later – on October 8 – the employees walked out. Although the record did not disclose any new demands after September 21, the Board's conclusion (R. 150) that the prior demands "were not so remote in point of time as to warrant their exclusion from our consideration in determining the cause for the walkout", is plainly warranted, for "the language of Section 7 is broad enough to protect concerted activities whether they take place before, after or at the same time . . . [the] demand[s] [are] made." *N.L.R.B. v. Washington Aluminum Co.,* 370 U. S. 9, 14.

Furthermore, as the Company recognizes (Br. p. 18) the walkout was obviously triggered by the decision of Saxer, the employees' spokesman, (Co. Br. p. 34; *supra,* p. 5) to quit when he was again denied a wage increase. After Porschien told him "we are going to keep this rate the way it is for a while," Saxer informed the other employees in the machine shop of his decision to resign. Later that morning the other employees in the machine shop decided that this would be a good time to "wake up" management, and that they would leave after five hours work at 11:24 a.m.

Based on this evidence the Board could properly find that the walkout was a response to management's failure to grant the employees' demands for additional benefits. While entirely plausible in itself, this conclusion is further buttressed by the weakness of any contrary explanation for the walkout. The idea that the employees were "mad" at Porschien and that the walkout was designed to embarrass him, a suggestion first raised by Porschien's testimony (Tr. 17) and mentioned by the Trial Examiner (R. 32), simply cannot withstand scrutiny. The record indicates that Porschien, a Company official on an intermediate level (department manager for the machine and sheet metal shops), had no final control over wages or working conditions at the machine shop (Tr. 139, 148).

Porschien did not even attend the September 21 meeting between the tool and die makers and management (Tr. 149), and there was no reason why the dissatisfaction of the employees should have been directed specifically at him. The unlikelihood of such a possibility is borne out by the fact that when the Company later questioned the employees about the walkout not a single employee even hinted that he was angry with Porschien or that such anger was the reason for the walkout. The decision of the employees to "wake up" management could only have reference to their decision to bring home to the Company the seriousness of their demands.

The Company's contention that when it discharged these employees, it had no knowledge that they had engaged in a protected walkout is unavailing. *N.L.R.B. v. Burnup & Sims,* 379 U. S. 21, 23-24. As *Burnup & Sims* made clear, the right of employees to engage in protected activities is not conditioned upon the employer's awareness that such activities are in fact sanctioned by the Act. Accordingly, since the employees were discharged for engaging in protected activities, the employer's knowledge of such activities is irrelevant. In any event, assuming, *arguendo,* that such knowledge is indispensible to the finding of a violation in this case, the Board could properly find as it did that the Company "knew or had reasonable basis for inferring that the walkout was but a further step by machine shop personnel to improve their employment terms" (R. 150). Thus, Vice President Vasta and Assistant Personnel Manager Bunker obtained considerable information during their telephone conversation with employees which tied the walkout to terms and conditions of employment. Toolmaker Gilbert told Vasta that he had left because he was dissatisfied with his rate of pay, and that the employees would speak to him the next day "as a group." Employee Bates explained to Vasta that he had walked out because the situation at the shop was a mess, and that he was

unhappy with the whole stiuation. Bates further explained that he had been ostracized by his fellow employees for failure to attend the September 21 meeting. Similarly, employee Will Mooney advised Bunker that he had joined the walkout because he was tired of working overtime.

Finally, although Vice President Vasta had originally selected Will Mooney as one of the employees to be discharged, this decision was reversed when Porschien told Vasta that he thought Will Mooney really liked his job and was just "caught up" in the walkout (R. 26; Tr. 211, 213). By retaining Will Mooney on this basis the Company expressly recognized that the walkout concerned terms and conditions of employment.

In light of this evidence, and considering the fact that the Company was well aware of the concerted activities of its employees, the Board could properly find that the Company realized that the walkout was linked to employee dissatisfaction with their terms of employment.[7]

The Company also argues that even if the walkout was for a protected object, it lost such protection because "the National Labor Relations Act does not protect activities during working hours which disturb the efficient operation of the employer's business." This argument is without substance. *N.L.R.B. v. Washington Aluminum Co., supra,* 370 U. S. 9. The disturbance of the employer's business in this case was simply an interruption in production which is the normal result of an ordinary strike. Such interruptions are clearly protected as part of the right to strike under Section 7

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[7] Although the Trial Examiner drew a contrary inference and found that the walkout was not for a protected object, his finding is entitled to no special weight here. The Board adopted the Trial Examiner's credibility determinations and findings of fact; it disagreed with the Examiner only as to inferences to be drawn from established facts. This was, of course, the Board's prerogative. *N.L.R.B. v. Stafford Trucking, Inc.,* 371 F.2d 244, 249 (C.A. 7). See also, *Universal Camera Corp. v. N.L.R.B.,* 340 U. S. 474, 496.

and 13 of the Act. For example, in *Washington Aluminum, supra,* the employees walked out to protest their employer's failure to provide adequate heat. The Court held that since the walkout constituted protected activity, the employees could not be discharged, even though the stoppage disturbed the employer's business and was in defiance of a plant rule which forbade employees to leave their work without permission. In short, there is no reason to regard the walkout as unprotected, and by discharging four employees who had participated in such activity the Company violated Section 8(a)(1) of the Act.[8]

II. The Company was Granted a Fair Hearing

Section 102.30 of the Board's rules[9] provides that "Witnesses shall be examined orally under oath, except that for good cause shown . . . testimony may be taken by deposition." After issuance of the Complaint in this case the Company made application to take the depositions of the four dischargees in this proceeding, claiming that such depositions were "necessary" to enable the Company to "properly prepare" its case. The application stated only that the Company had not "communicated with [the dischargees] in any respect" and had "no knowledge concerning the unfair labor practices alleged."

The matter was submitted to the Associate Chief Trial Examiner, who denied the Company's request, "as good cause for granting the application

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[8] The cases cited by the Company in support of its position are inapposite (Br. 31-36). Both *Cleaver-Brooks Mfg. Corp. v. N.L.R.B.,* 264 F.2d 637 (C.A. 7), cert. denied, 361 U. S. 817 and *American Art Clay Co. v. N.L.R.B.,* 328 F.2d 88 (C.A. 7) involve the problem of whether employee protests concerning the assignment or selection of foremen are protected activity, or whether such protests interfere with management's exclusive right to handle its supervisory personnel as it deems fit. There is no similar problem involved in the present case. We are also not concerned here with a series of "quickie" walkouts by employees to exert pressure on an employer to bargain as was the case in *N.L.R.B. v. Blades Mfg. Co.,* 344 F.2d 998 (C.A. 8).

[9] Rules and Regulations and Statements of Procedure Series 8, as amended.

does not appear" (R. 15, 16). The Company contends that this refusal to allow it to obtain depositions for purposes of discovery hampered the presentation of its case, and denied it a fair hearing. We submit that this contention must be rejected.

Although Section 102.30 does permit the taking of depositions for "good cause shown", it is well established that neither this provision, nor any other provision in the Board's rules, allows for general pretrial discovery. *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (C.A. 9); *N.L.R.B. v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (C.A. 7), cert. denied, 368 U. S. 823; *N.L.R.B. v. Chambers Mfg. Corp.*, 278 F.2d 715, 716 (C.A. 5); *Raser Tanning Co. v. N.L.R.B.*, 276 F.2d 80, 81-83 (C.A. 6), cert. denied, 363 U. S. 830; *N.L.R.B. v. Plumbers and Steamfitters Union Local 100,* 291 F.2d 927 (C.A. 5), enforcing 128 NLRB 398. See also, *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (C.A. 9).[10] Cf. *N.L.R.B. v. Safway Steel Scaffolds Co.*, 383 F.2d 273, 277 (C.A. 5), cert. denied, 390 U. S. 955.

In any event, the Company's claim that lack of discovery hampered presentation of its case is without substance. Board procedures were completely adequate to allow the Company to fully present its case. Moreover, as the record shows, it did so. Board Rule 102.15 provides, *inter alia,* that "The complaint shall contain . . . a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the name of respondent's agents or other representatives by whom committed." Here, approximately six weeks before the hearing opened, the Company was served with a complaint which specifically framed the

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[10] Rule 102.30 was first adopted in its present form on October 28, 1942. 7 Fed. Register 8679.

issues for trial. It alleged that the Company violated Section 8(a)(1) of the Act by discharging Saxer, Mooney, Gilbert, and Pickelman, on or about October 10, 1966, because of their participation in protected concerted activity (R. 6). There was, therefore, no basis for the Company's claim, in its application to take depositions, that it had "no knowledge concerning the unfair labor practices alleged." Furthermore, in preparing for trial the Company could have interviewed the employees about specific matters alleged in the complaint.[11] The record shows that at the time of the events in question, the Company did interview employees who had participated in the walkout, and, as we have shown, *supra,* pp. 15-16 the Company was fully aware of what had happened, and the reasons for the employees' action. Furthermore, at the hearing, the Company cross-examined the dischargees and was permitted to inspect pre-trial statements given by the witnesses to Board agents. The evidence which it asserts (Br. pp. 14-15) would have been adduced by means of deposition, could as easily have been presented at the hearing. In sum, the Company "has made no showing of prejudice suffered by reason of the Board's denial of pre-trial discovery." *Storkline Corp. v. N.L.R.B.,* 330 F.2d 14, 15-16 (C.A. 5). Accord: *N.L.R.B. v. Central Oklahoma Milk Producer's Ass'n.,* 285 F.2d 495, 498 (C.A. 10); *Trojan Freight Lines, Inc. v. N.L.R.B.,* 356 F.2d 947, 948 (C.A. 6); *N.L.R.B. v. Gala-Mo Arts,* 232 F.2d 102, 106 (C.A. 8).

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[11] See, *e.g., Texas Industries, Inc. v. N.L.R.B.,* 336 F.2d 128, 133 (C.A. 5) and cases cited therein.

CONCLUSION

For the reasons stated, we respectfully submit that a decree should be issued denying the petition to review and enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST
Assistant General Counsel,
LAWRENCE M. JOSEPH,
LEON M. KESTENBAUM,
Attorneys,
National Labor Relations Board

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